Ranjit Singh a/l Jit Singh v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–184 OF 2008

B

ABDUL MALIK ISHAK, AZHAR MA'AH AND AZIAH ALI JJCA
10 AUGUST 2012

C

Criminal Procedure — Trial — Change of judge — Whether second judge who continued with part-heard trial without rehearing witnesses who previously testified hampered in exercising maximum evaluation of evidence — Whether second judge correctly relied on evidence recorded by first judge — Whether prosecution had discretion to decide whom to call as witness to unfold its narrative — Whether adverse inference could not be invoked in all cases of non-calling of witness unless prosecutor had oblique motive

D

The High Court judge who had commenced a drug trafficking trial against the appellant ('accused') was transferred to the Court of Appeal after he had heard and recorded the testimonies of two prosecution witnesses, P1 and P2. Another judge ('the second judge') continued the trial from where the earlier one had left off. SP1 and SP2 were not, however, recalled to re-testify before the second judge. At the end of trial the accused was convicted and sentenced to death for trafficking in 107.7g heroin and monoacetylmorphine under s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution's evidence was that when a police party acting on information arrived at a house where the accused was staying, one of the police officers, SP1, saw the accused throw a bag down from the first floor balcony. SP1 had testified that when he shouted 'Police', the accused turned to look at him and the accused 'looked scared'. Another officer, SP6, testified that he saw a bag falling from the balcony at about the same time SP1 shouted 'Police'. SP6 picked up the bag and handed it to SP1 who opened it in the presence of the accused and found the drugs inside it. At the time of the incident another man, SD2, was in the house and he was also arrested together with the accused. In his defence, the accused denied the prosecution's version of events. He also denied any knowledge of the bag or its contents. He said police barged into the house and arrested him and later produced the bag and forced him, unsuccessfully, to admit that the bag and its contents were his. In his appeal to the Court of Appeal against conviction and sentence, the accused, inter alia, argued (i) that the second judge, while relying heavily in his judgment on SP1's evidence, could not have exercised maximum evaluation of the evidence of SP1 and SP2 because their evidence was not recorded by him but by the first judge who had the audio-visual advantage of assessing their credibility and (ii) adverse inference under s 114(g) of the Evidence Act 1950

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should have been invoked against the prosecution for not calling SD2 as its witness to complete the narration of its case.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The second judge was not hampered in exercising maximum evaluation of the testimonies of SP1 and SP2 as recorded by the first judge. The second judge was only concerned with the cold-print of their evidence and not as to their demeanour. It was argued the second judge erred in alluding to SP1's demeanour. But the facts were straight-forward. There was no necessity to look at SP1's demeanour. The notes of evidence spoke a thousand words. The second judge did not do anything unusual in handling the part-heard case. He merely perused through the evidence in cold print and made references to *actus reus* and *mens rea* (see para 30).

(2) Counsel for the accused did not invoke s 261(a) of the Criminal Procedure Code to demand that SP1 and SP2 be re-summoned and re-heard before the second judge when he took over the hearing of the case from the first judge (see para 24).

(3) Whilst the defence challenged the evidence that the accused threw the bag from the first floor, the evidence about the accused looking back and looking scared as seen by SP1 was not challenged. The second judge was therefore right when he said the accused 'had looked back and had appeared scared'. He was relying on the notes of evidence recorded by the first judge to narrate the sequence of events (see paras 31 & 33).

(4) Relying on the evidence as recorded by the first judge, the second judge ventured a correct opinion to the effect the accused's actions in throwing down the bag before SP1 shouted the word 'Police', and his looking scared, showed that the accused had physical possession over the bag and that he knew there were dangerous drugs inside it (see para 36).

(5) SD2 was not relevant to the unfolding of the prosecution's narrative because he was inside the house watching television and would not and could not have seen the accused throwing the bag down. He was also not implicated in the accused's cautioned statement. No adverse inference could be invoked against the prosecution for not calling SD2 as its witness as there had not been any suppression of material evidence (see paras 41 & 44).

(6) The court would be reluctant to interfere with the prosecution's exercise of discretion not to call SD2 unless it could be shown, and this was not done, that the prosecutor having conduct of the trial had been influenced by some oblique motive. Whether the prosecution should have called SD2 as its witness and then offered him to the defence was entirely the prosecution's discretion and it should not be made the subject of criticism (see paras 42–43).

(7) The accused's defence was incapable of belief and was not one that was probable under the circumstances. The defence fell far short of rebutting the presumption of trafficking on the balance of probabilities and failed to raise a reasonable doubt as to the accused's guilt which the prosecution had established beyond reasonable doubt (see para 64).

[Bahasa Malaysia summary

Hakim Mahkamah Tinggi yang memulakan satu perbicaraan pengedaran dadah terhadap perayu ('perayu') telah dipindahkan ke Mahkamah Rayuan selepas beliau mendengar dan merekodkan keterangan-keterangan daripada dua saksi pendakwaan, SP1 dan SP2. Hakim yang lain ('hakim kedua') menyambung perbicaraan daripada di mana ia terhenti. SP1 dan SP2 bagaimanapun, dipanggil untuk memberi keterangan semula di hadapan hakim kedua. Pada penghujung perbicaraan, tertuduh disabitkan dan dijatuhkan hukuman mati kerana mengedarkan 107.7g heroin dan monoacetylmorphine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Keterangan pendakwaan adalah bahawa apabila pihak polis yang bertindak berdasarkan maklumat tiba di rumah di mana tertuduh tinggal, seorang daripada pegawai polis, SP1, melihat tertuduh mencampakkan sebuah beg ke bawah daripada balkoni tingkat satu. SP1 telah memberi keterangan bahawa apabila dia melaung 'Polis', tertuduh berpaling melihatnya dan tertuduh 'kelihatan takut'. Pegawai lainnya, SP6, memberi keterangan bahawa dia melihat sebuah beg jatuh daripada balkoni pada masa yang sama SP1 melaungkan 'Polis'. SP6 mengutip beg tersebut dan memberinya kepada SP1 dengan kehadiran tertuduh dan menemui dadah di dalamnya. Pada masa insiden tersebut seorang lelaki lain, SD2, berada di dalam rumah dan dia juga ditangkap bersama dengan tertuduh. Dalam pembelaannya, tertuduh menafikan versi kejadian pendakwaan. Dia juga menafikan sebarang pengetahuan mengenai beg atau isi kandungannya. Dia mengatakan bahawa polis menyerbu masuk ke dalam rumah dan menangkap dia dan kemudiannya menunjukkan beg tersebut dan memaksanya, namun gagal, untuk mengakui bahawa beg dan isi kandungannya adalah kepunyaannya. Dalam rayuannya ke Mahkamah Rayuan terhadap sabitan dan hukuman, tertuduh, antara lainnya, menghujah (i) bahawa hakim kedua, sementara bergantung sepenuhnya dalam penghakimannya atas keterangan SP1, tidak menjalankan penilaian maksima keterangan SP1 dan SP2 kerana keterangan mereka tidak direkodkan oleh beliau tetapi oleh hakim pertama yang mempunyai kelebihan audio-visual untuk menilai kredibiliti mereka dan (ii) anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 tidak seharusnya digunakan terhadap pendakwaan kerana tidak memanggil SD2 sebagai saksinya untuk menyempurnakan penceritaan kesnya.

Diputuskan, mengetepikan rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim kedua tidak dihalang dalam membuat penilaian maksima

keterangan-keterangan SP1 dan SP2 seperti yang direkodkan oleh hakim pertama. Hakim kedua hanya mengambil berat terhadap keterangan seperti yang dikemukakan dalam 'cold print' dan bukannya tingkah laku mereka. Dihujahkan bahawa hakim kedua terkhilaf dalam merujuk kepada tingkah laku SP1. Tetapi fakta-fakta adalah sangat jelas. Tiada keperluan untuk melihat kepada tingkah laku SP1. Nota-nota keterangan menyatakan ribuan perkataan. Hakim kedua tidak melakukan apa-apa yang luar biasa dalam mengendalikan kes yang didengar sebahagian. Beliau hanya meneliti keterangan yang dikemukakan dalam 'cold print' dan membuat rujukan kepada *actus reus* dan *mens rea* (lihat perenggan 30).

(2) Peguamcara kepada tertuduh tidak menggunakan s 261 Kanun Acara Jenayah untuk meminta bahawa SP1 dan SP2 dipanggil semula dan didengar semula di hadapan hakim kedua apabila beliau mengambil alih pendengaran daripada hakim pertama (lihat perenggan 24).

(3) Walaupun pembelaan mencabar keterangan yang tertuduh mencampakkan beg daripada tingkat pertama, keterangan mengenai tertuduh berpaling dan kelihatan takut seperti yang dilihat oleh SP1 tidak dicabar. Hakim kedua adalah benar apabila dia mengatakan bahawa tertuduh 'berpaling dan kelihatan takut'. Beliau bergantung ke atas nota-nota keterangan yang direkodkan oleh hakim pertama untuk menceritakan urutan kejadian (lihat perenggan 31 & 33).

(4) Bergantung kepada keterangan seperti yang direkodkan oleh hakim pertama, hakim kedua berani membuat pendapat yang tepat terhadap kesan tindakan tertuduh mencampakkan beg ke bawah sebelum SP melaungkan perkataan 'Polis', dan dia kelihatan takut, menunjukkan bahawa tertuduh mempunyai milikan fizikal terhadap beg tersebut dan dia tahu bahawa terdapat dadah berbahaya di dalamnya (lihat perenggan 36).

(5) SD2 tidak relevan untuk memberitahu cerita pendakwaan kerana dia berada di dalam rumah menonton televisyen dan tidak akan dan tidak mungkin melihat tertuduh mencampak beg ke bawah. Dia juga tidak dikaitkan dalam penyataan beramaran tertuduh. Tiada anggapan bertentangan boleh digunakan terhadap pendakwaan kerana tidak memanggil SD2 sebagai saksinya memandangkan tidak terdapat sebarang halangan keterangan penting (lihat perenggan 41 & 44).

(6) Mahkamah enggan untuk campur tangan dengan pertimbangan pendakwaan untuk tidak memanggil SD2 melainkan dia seharusnya ditunjukkan dan ini tidak dilakukan, bahawa pendakwaraya yang menjalankan perbicaraan telah dipengaruhi oleh sesuatu motif serong. Sama ada pendakwaan sepatutnya memanggil SD2 sebagai saksinya dan kemudiannya menawarkannya kepada pembelaan adalah berdasarkan

pertimbangan pendakwaan sepenuhnya dan tidak seharusnya dijadikan sebagai subjek kritikan (lihat perenggan 42–43).

(7) Pembelaan tertuduh tidak boleh dipercayai dan adalah sesuatu yang tidak mungkin di bawah keadaan tersebut. Pembelaan gagal mematahkan anggapan pengedaran atas imbangan kebarangkalian dan gagal untuk menimbulkan satu keraguan munasabah terhadap kebersalahan tertuduh di mana pendakwaan telah membuktikan melangkaui keraguan munasabah (lihat perenggan 64).]

Notes

For a case of change of judge, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5013.

Cases referred to

Adel Muhammed El Dabbah v Attorney-General for Palestine [1944] AC 156, PC (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Chelliah v PP [1941] MLJ 17 (refd)

Kevin Fenlon, Raymond Frank Neal, Gary Steven Neal (1980) 71 Cr App R 307 (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)

PP v Nordin Awang [2000] MLJU 631; [2001] 1 AMR 855, HC (refd)

PP v See Hee Meng [1988] 2 CLJ (Rep) 318 (refd)

PP v Teh Cheng Poh [1980] 1 MLJ 251 (refd)

R v Bircham [1972] Crim LR 430, CA (refd)

R v Wood Green Crown Court, ex parte Taylor [1995] Crim LR 879, QBD (refd)

R v Walter Berkley Hart (1932) 23 Cr App R 202 (refd)

Sussex Peerage, The (1844) 11 Cl & Fin 85, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 s 18, 18(2)(a)(i), (ii)
Criminal Procedure Code ss 180, 261, 261(a)
Dangerous Drugs Act 1952 s 39B(1)(a), (2)
Evidence Act 1950 ss 91, 92, 114(g), 134

Appeal from: Criminal Trial No 45–126 of 2004 (High Court, Shah Alam)

Muhammad Shafee bin Muhammad Abdullah (Badrul Munir Bukhari with him) (Shafee & Co) for the appellant/accused.

Mangaiarkarasi a/p Krishnan (Shoba Venu Gobal with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged before the High Court and convicted, after a full trial, and sentenced to death for trafficking in 107.7g of heroin and monoacetylmorphine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. The charge against the appellant reads as follows:

> Bahawa kamu pada 15 Ogos 2003 jam lebih kurang 7.00 petang, di alamat Lot 6-B, Lorong Awam 3, Kampung Kuala Ampang, Ulu Kelang, Ampang, di dalam daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, telah mengedarkan dadah berbahaya iaitu Heroin dan Monoacetylmorphine dengan jumlah berat 107.7 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen, 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] Chief Inspector Haris Fadillah bin Hashim (SP1) and Nazarudin bin Mohamed @ Ibrahim (SP2) testified before the first High Court judge. The trial was then continued before the succeeding High Court judge ('the second High Court judge').

THE FACTS

[3] Acting on information received, a police party from the Narcotics Department raided a house at Lot 6-B Lorong Awam 3, Kampung Kuala Ampang, Ulu Kelang, Ampang, Selangor at 7pm on 15 August 2003. When the police party arrived at the said house in police vehicles, noises were produced by the closing of the doors of the police vehicles. SP1 accompanied by Sergeant Major 69263 Ahmad Ruslan quickly rushed to the said house and as SP1 was approaching the unit on the first floor of the said house, SP1 saw a man at the end of the corridor/balcony outside the unit in question who was in the act of throwing down a bag from the said corridor/balcony. SP1 shouted 'Polis' at the said man. At that very moment, the said man turned his head towards SP1 and according to SP1 the said man looked scared. SP1 testified as follows (see p 15 of the appeal record at *jilid* 1):

> Semasa OKT mencampak beg tersebut, kedudukan beliau adalah membelakangi saya sambil menoleh ke arah saya apabila saya menjerit 'Polis'. Apabila saya menjerit 'Polis' OKT sedang mencampak beg tersebut. OKT mencampak beg ke bahagian belakang rumah. Beg tersebut jatuh ke bawah. Selepas mencampak beg tersebut OKT kelihatan takut. Saya terus menangkap dia.

[4] At about the same time, SP1 heard a voice shouting from below, 'beg jatuh'. That voice belonged to Detective Lance Corporal Tamie Ho (SP6).

[5] According to SP6, he saw a bag falling down at about the same time that SP1 shouted the word 'Polis'. SP6 quickly proceeded to collect the bag that landed on the ground and brought it up to the unit where SP1 was located. SP6 then handed the bag to SP1 personally. SP6 testified that when he retrieved the bag, it was zipped up but was not locked. SP6 also testified that he did not open the bag to check its contents before handing it to SP1 who was inside the unit of the said house. There was also another man in the unit of the said house at the material time. His name is Sures Kumar a/l Sahadevan and he was also arrested by the police on that day.

[6] On receipt of the bag from SP6, SP1 unzipped the bag in the presence of the man who had allegedly thrown the said bag down to the ground from the corridor/balcony upstairs. This man was identified by SP1 in court as the appellant. Upon examining the bag marked as exh 'P9' in the presence of the appellant, SP1 found that it contained five packets wrapped in brown paper which upon further examination was found to contain five transparent plastic packets which in turn, upon further examination, was found to contain powdery substances suspected to be heroin. The bag ('P9') and its contents were duly seized and after SP1 had put his markings on each of them, SP1 handed them over to Chief Inspector Romaliza (SP7) — the investigating officer of the case. In due course, the government chemist (SP2) analysed the powdery substances and confirmed that they were heroin and monoacetylmorphine, a dangerous drug, as listed in the DDA.

[7] Low Beng Yen (SP4), the owner of Lot 6-B Lorong Awam 3, Kampung Kuala Ampang, Ulu Kelang, Ampang, Selangor testified for the prosecution. SP4 testified that the appellant rented his unit at the said address.

PRIMA FACIE CASE

[8] Within a short compass, that was the case for the prosecution. The second High Court judge assessed the evidence, at the close of the prosecution's case, on a maximum evaluation basis and His Lordship found, after applying s 180 of the Criminal Procedure Code ('CPC') and the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, that the prosecution had succeeded in proving a prima facie case of drug trafficking as per the charge and His Lordship duly called the defence of the appellant to answer that charge.

[9] The appellant elected to give a sworn evidence and he also called two other witnesses, namely, Sures Kumar a/l Sahadevan (SD2) and Chandra Mohan a/l R Maniam (SD3).

[10] The prosecution also called rebuttal witnesses, namely:

(a) Chief Inspector Romaliza bt Ramli (SPRW1);

(b) Corporal Abdul Aziz bin Mihat (SPRW2); and

(c) Chief Inspector Roslan bin Hussain (SPRW3).

THE DEFENCE

[11] The appellant testified that on the day of the raid, he was praying in his house at the praying altar next to the living room and SD2 was sitting in the living room watching television, when suddenly a man entered his house and demanded to know who 'Ranjit' was. When the appellant admitted that he was 'Ranjit', the appellant was manhandled and arrested by persons who later introduced themselves as policemen. The appellant was then taken to his room where he was bodily searched but nothing incriminating was found on him. The police personnel then searched the other room in the house but could not find anything illegal.

[12] The appellant testified further. He said that about 20 minutes later, he saw another man whom he presumed to be a police officer entering into his room bringing with him the bag ('P9') which was later examined in his presence and was found to contain the suspected drugs, to wit, heroin and monoacetylmorphine, in five plastic packets and wrapped in brown paper. According to the appellant, he was forced by the police officers to admit to be the owner of the bag ('P9') and its contents. The appellant refused to admit. Thereafter, the appellant together with the bag ('P9') and its contents and SD2 were taken to the police station for further investigations.

[13] Learned defence counsel emphasised that the appellant had been victimised by the police and that the appellant had been fixed up and was unfairly framed for trafficking in the dangerous drugs as per the charge.

ANALYSIS

[14] Dato' Sri Dr Muhammad Shafee Abdullah for the appellant submitted along the following lines. He submitted that it is a typical case of the police raiding party witnessing the appellant dropping the bag ('P9') from the corridor/balcony of the first floor of the house. And this transpired according to him even before SP1 shouted 'Polis' at the appellant. He urged us to look at the case with the greatest of suspicion. He drew our attention to the cautioned statement of the appellant that was recorded on 18 August 2003 at 3pm marked as exh 'D26'. That cautioned statement was recorded three days after

the appellant was arrested and the defence of the appellant was set out in that cautioned statement. He also drew our attention to the statement of SD2 recorded under s 112 of the CPC on 30 August 2003 at 11 am marked as exh 'D29'. SD2's statement was recorded 15 days after his arrest and it tallied with the contents of the cautioned statement of the appellant. He submitted that their statements are absolutely consistent with one another.

[15] The learned deputy public prosecutor submitted that the second High Court judge has analysed the evidence and has applied his mind to the evidence adduced by the prosecution and His Lordship was satisfied that the ingredients of the offence of trafficking in dangerous drugs under s 39B(1)(a) of the DDA had been proven. Indeed the second High Court judge evaluated the evidence adduced by the prosecution and came to the conclusion that it supported the charge preferred against the appellant.

[16] But it was argued by learned defence counsel that the second High Court judge erred in fact and in law when His Lordship said that he had assessed the evidence of SP1 and SP2. It must be recalled that SP1 saw the appellant throwing the bag ('P9') to the ground from the first floor. That SP1 also saw the appellant looked scared. The demeanour of the appellant was seen and narrated by SP1. The evidence of SP1 was heard and recorded by the first High Court judge. So was the evidence of SP2 that was heard and recorded by the first High Court judge. The second High Court judge whose written judgment is put under scrutiny did not see nor record the evidence of SP1–SP2. And so it was argued that the second High Court judge had no opportunity to exercise maximum evaluation of the most crucial witness, namely, that of SP1.

[17] It was further argued that the second High Court judge failed to appreciate that the narration of the facts forming the oral evidence that led to the conviction of the appellant essentially came from the evidence of SP1. That, according to learned defence counsel, is the troubling aspect of this case. A serious area of concern. The second High Court judge had no audio visual advantage of SP1–SP2. Yet, the second High Court judge placed serious emphasis on SP1.

[18] It was vehemently argued that the defence challenged the whole story advanced by the prosecution. And that the second High Court judge did not apply the law of maximum evaluation properly. The search list as per exh 'D5' at p 301 of the appeal record at *jilid* 2 was given to both the appellant and SD2, yet only the appellant was charged.

[19] When the second High Court judge took over conduct of the trial, SP1 and SP2 were not recalled. The defence challenged SP1's version that the

appellant threw the bag ('P9') to the ground. And learned defence counsel submitted that he was 'prepared to say that the bag ('P9') was found in the house. But the police cannot 'bunga-bungakan perkara ini'.'

[20] Miss Mangaiarkarasi a/p Krishnan, the learned deputy public prosecutor, argued on behalf of the public prosecutor. She drew our attention to s 261 of the CPC. That section reads as follows:

> Change of Magistrate during hearing
>
> 261 Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

[21] This is an interesting provision. It envisages a situation where a magistrate has heard the matter partly and thereafter he ceases to have jurisdiction. And the succeeding magistrate can continue to hear the matter based on the evidence recorded or he may re-summon the witnesses and recommence the inquiry or trial. The proviso (a) permits the accused to demand from the succeeding magistrate that the witnesses be re-summoned and re-heard. Home J in *Chelliah v Public Prosecutor* [1941] MLJ 17 held that where a case is partly heard before one magistrate and resumed before another, it is obligatory for the second magistrate to recall witnesses if the accused asks for them.

[22] At this juncture, it is germane to refer to the notes of evidence recorded at the High Court. At pp 38–39 of the appeal record at *jilid* 1, the proceedings on 9 March 2007 showed what had transpired at the High Court:

> DALAM MAHKAMAH TERBUKA
>
> BERTARIKH 9 MAC 2007
>
> 45-126-2004
>
> TPR Puan Samihah bagi pihak pendakwaraya.

Peguam Encik Gurbachan Singh bagi pihak OKT.

OKT hadir.

t.t.

(DATO' K.N. SEGARA)

Peguam:

This case is also part-heard and very early stage of trial. No objection to case being heard before a new judge for continuation.

Timbalan Pendakwaraya:

Tiada bantahan.

Mahkamah:

Dipindahkan ke MT.J.(5) (YA Tuan Abang Iskandar) untuk menyambung perbicaraan seterusnya sehingga selesai.

Pihak-pihak dikehendaki hadir di MT.J.(5) hari ini juga untuk sebutan dan menetapkan tarikh-tarikh perbicaraan.

t.t.

(DATO' K.N. SEGARA).

[23] Before the High Court, learned defence counsel who had conduct of the case in the person of Mr Gurbachan Singh agreed that the case was part-heard and to be heard by a new judge for continuation. The deputy public prosecutor — Puan Samihah, agreed and His Lordship KN Segara J (now JCA) made the order accordingly. All these showed that the parties agreed that a new judge would hear the case on a continued basis.

[24] With respect, Mr Gurbachan Singh, an experienced criminal lawyer, did not invoke proviso (a) to s 261 of the CPC to demand from the second High Court judge — the succeeding trial judge, that SP1–SP2 be re-summoned and re-heard. The notes of evidence recorded by the second High Court judge at pp 41–42 of the appeal record at *jilid* 1 for the session on 30 March 2007 are self-explanatory:

DALAM MAHKAMAH TERBUKA

BERTARIKH 30 MAC 2007

Dl HADAPAN

YA TUAN ABANG ISKANDAR

t.t

(TUAN ABANG ISKANDAR)

TPR: Cik Shoba Venu Gopal.

P/B: En. Gurbachan bagi pihak OKT.

OKT:Hadir.

J/B: En. Khairul & Cik Rehah.

P/B: Saya pohon maaf kerana berada untuk sebutan kes-kes di hadapan Mahkamah Yang Arif Pn. Nalini yang ambil masa agak panjang.

Mahkamah: Noted and accepted.

Sila teruskan dengan kes.

TPR: Saya panggil saksi ketiga pendakwaan, Lance Corporal Zainal.

[25] We wonder why there was a failure on the part of the appellant's counsel to apply to re-summon and re-hear the evidence of not only SP1 but also SP2 before the second High Court judge — succeeding trial judge?.

[26] Here, we have the evidence of SP1 a senior police officer who testified as to the events that happened on that fateful day. SP2, a government chemist, gave an expert evidence and confirmed that the powdery substances were dangerous drugs within the meaning of the DDA. As a succeeding trial judge who continued the part-heard case by recording the evidence of Mohd Zainal bin Hashim (SP3) and henceforth, His Lordship was not concerned about the demeanour of SP1 and SP2. His Lordship, as a succeeding trial judge, was only concerned about the cold-print of the evidence of SP1 and SP2 and not as to their demeanour. We agree with Dato' Sri Dr Muhammad Shafee Abdullah's submission that a police officer's duty is to tell the truth. And that was what SP1 did when he testified before the High Court.

[27] The notes of evidence at pp 272–273 of the appeal record at *jilid* 2 showed the narration of the facts of the case by the second High Court judge who continued hearing the part heard case as a succeeding trial judge, a duty which His Lordship has to discharge as a criminal trial judge. Yet what His Lordship did was criticised as a judgment pertaining to the credibility of SP1.

[28] Our attention was drawn to the following passages in the written grounds of judgment of the second High Court judge as seen at p 275 of the appeal record at *jilid* 2:

> To my mind, the evidence of SP1 had effectively established the factum of possession and its attendant mens rea on the part of the OKT over P9 and its contents. The conduct of the OKT of throwing down the bag at a time even before the SP1 had shouted the word 'Polis' at him, can only be indicative of two things, and two things only, and they are, namely (i) that the OKT had physical possession over P9 and (ii) that he also knew the nature of the things contained in the said P9.

How else could one reasonably explain such behaviour coupled with the fact that the OKT had looked scared after he had thrown the bag P9 down from the corridor/balcony. That subsequent conduct on the part of the OKT had given away his true state of mind in the context of the whole episode.

[29] And it was submitted that the second High Court judge relied strongly on demeanour to anchor liability on the appellant.

[30] Again, when the second High Court judge in his written judgment at p 277 of the appeal record at *jilid* 2 wrote that 'Coupled with his facial reaction which was observed by SP1 at the balcony after the accused person had thrown down the said bag, it is rather difficult not to infer his guilty knowledge', it was argued that His Lordship erred in alluding to the demeanour of SP1. But the facts are straight forward. There is no necessity to look at the demeanour of SP1. The notes of evidence speak a thousand words. The second High Court judge did not do anything unusual in handling this part-heard case. His Lordship merely perused through the evidence in cold print and made references to actus reus and mens rea. At p 275 of the appeal record at *jilid* 2, His Lordship aptly said:

SP1 testified that he saw the OKT was in the act of throwing down the bag (P9) when he reached the corridor/balcony outside the unit No 6B, the unit that was rented by the OKT from SP4. When the SP1 shouted the word 'Polis' at the accused person, it was in evidence and not challenged by the defence that the OKT had looked back and had appeared scared. It is my finding of law that taken as one whole transaction, the actus reus of throwing the bag (P9) down the balcony, coupled immediately with the observation on OKT's face by SP1, clearly to my mind had shown the mens rea that had accompanied and actuated the OKT's action of throwing down the bag (P9) from the corridor/balcony.

[31] Learned defence counsel pointed out that it was wrong to say that the evidence of SP1 was not challenged. We have seen the transcripts of the proceedings and we say that there was a challenge about the throwing of the bag ('P9') from the first floor to the ground level. But the evidence about the appellant looking back and looking scared as seen by SP1 was not challenged at all. To augment our assertions, we will now reproduce the notes of evidence at pp 29–30 of the appeal record at *jilid* 1 in regard to the cross-examination of SP1:

Soalan: Katakan bahawa pada masa kamu naik ke tingkat atas kamu langsung tidak lihat OKT berdiri di anjung bahagian atas rumah?

Jawapan: Tak setuju.

Soalan: Katakan kamu langsung tidak lihat OKT memegang beg P9 atau buang beg P9 dari anjung bahagian atas rumah?

Jawapan: Tak setuju.

Soalan: Katakan keterangan awak dan kandungan P4 berkenaan dengan keterangan bahawa kamu lihat OKT membuang beg P9 adalah tidak benar?

Jawapan: Tak setuju.

[32] It has been stated, time and again, that the failure of a party to cross-examine a witness on his evidence or any particular part of it, would, in law, amount to an implied acceptance of the evidence and that party is not allowed to challenge it later by making an oral submission (*R v Walter Berkley Hart* (1932) 23 Cr App R 202; *R v Bircham* [1972] Crim LR 430; *Kevin Fenlon, Raymond Frank Neal, Gary Steven Neal* [1980] 71 Cr App R 307; and *R v Wood Green Crown Court, ex parte Taylor* [1995] Crim LR 879). The reason for this simple rule is to ensure fairness not only to the witness but also to the court. It is only through cross-examination that a witness is given an opportunity to provide an explanation for his testimony (per Lord Halsbury in *Browne v Dunn* (1893) 6 R 67 (HL), at p 76).

[33] Thus, the second High Court judge was right when His Lordship said that the appellant 'had looked back and had appeared scared'. His Lordship was relying on the notes of evidence recorded by the first High Court judge to narrate the sequence of events.

[34] There is s 18 of the Courts of Judicature Act 1964 ('CJA') that should be referred to. That section enacts as follows:

18 Proceedings in High Court to be disposed of by single Judge.

(1) Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single Judge.

(2) Whenever any Judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another Judge may-

(a) continue with the proceeding from the stage at which the previous Judge left it and —

(i) act on the evidence already recorded by the previous Judge; or

(ii) act on the evidence partly recorded by the previous Judge and partly by himself; or

(b) resummon the witnesses and recommence the proceeding.

(3) Where the Judge acts under subsection 2(a)(i) he may, either on his

volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take their evidence afresh:

Provided that in respect of a criminal proceeding, the Court of Appeal and the Federal Court may, on appeal, set aside any conviction had on evidence not wholly recorded by the Judge before whom the conviction was had if such Court is of the opinion that the accused had been materially prejudiced thereby, and may order a new trial.

[35] Section 18(2)(a)(i) of the CJA allows a succeeding judge to take over the proceeding left by the previous judge and the succeeding judge may continue with the proceeding from the stage at which the previous judge left it and, by virtue of s 18(2)(a)(ii) of the CJA, act on the evidence partly recorded by the previous judge and partly recorded by the succeeding judge. The imperative words used here are 'act on the evidence partly recorded by the previous judge and partly by' the succeeding judge. And this must necessarily mean that the succeeding Judge is at liberty to consider the evidence of witnesses who may have testified before the previous judge. Thus, in the present appeal before us, the second High Court judge had clearly acted upon the evidence partly recorded by the first High Court judge and partly by himself and His Lordship — referring to the second High Court judge, is not hampered in exercising maximum evaluation on the testimonies of SP1–SP2 as recorded by the first High Court judge.

[36] The words in sub-s (2)(a)(i)–(2)(a)(ii) of s 18 of the CJA 'are in themselves precise and unambiguous' and that 'best declare the intention of the lawgiver' (per Tindal CJ in *The Sussex Peerage* (1844) 11 Cl & Fin 85, 143). Consequently, it is not wrong for the second High Court judge when His Lordship stated that the evidence of SP1 and SP6 collectively showed that the appellant had thrown the bag ('P9') down from the corridor/balcony outside his rented unit. And relying on the notes of evidence as recorded by the first High Court judge, the second High Court judge merely echoed the evidence of SP1 that the appellant had looked scared when SP1 identified himself as 'Polis'. Again, relying on the evidence as recorded by the first High Court judge, the second High Court judge ventured a correct opinion to the effect that the appellant's actions in throwing down the bag ('P9') before SP1 shouted the word 'Polis', showed that the appellant had physical possession over the bag ('P9') and that the appellant knew that there were dangerous drugs inside the said bag ('P9').

[37] Next, it was argued that the prosecution should have called SD2-Sures Kumar a/l Sahadevan, to complete the narration of the prosecution's case. It was also argued that SD2 should have been called by the prosecution and after SD2 has taken his oath, SD2 should be offered to the defence for

cross-examination. That, according to learned defence counsel, is the best approach to deal with SD2. Here, SD2 was offered by the prosecution to the defence and SD2 was called by the defence. In such a situation, it was submitted that when the prosecution wanted to call rebuttal witnesses, the second High Court judge should not have allowed it. The prosecution's failure in not calling SD2 as their witness at the prosecution's stage was repaired by the evidence advanced through the rebuttal witnesses. It was also submitted that the failure to call SD2 by the prosecution would attract the adverse inference under s 114(g) of the Evidence Act 1950.

[38] According to learned defence counsel, the second High Court judge held that it was an 'open and shut case' because His Lordship believed the testimony of SP1. At pp 279–280 of the appeal record at *jilid* 2, this was what His Lordship said:

> However, in the case before this court, the case against the accused was rather a 'cut and dry' one. He was caught in the act of throwing down the bag with both his hands as seen by SP1. Sures, the other person who was arrested together with the accused person was at all times in the living room watching television and did not play any role at all. Though he was arrested, it is interesting to note that OKT did not implicate Sures in his caution statement (D26). As long as there was no oblique motive, the prosecution would have discharged this duty as long as it has not left any material gap in its case. If by not calling a witness, a material gap is created, then an invocation of an adverse inference would very much be in order. Looking at the evidence adduced by the prosecution in this case, especially those coming from SP1 and SP6, I am of the considered view that the Prosecution had not left any material gap in its case so as to justify this court invoking the adverse inference against it. The decision of Justice Salleh Abas LP, in the Supreme Court case of *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 has encapsulated the idea that is really the driving consideration behind the proper exercise of the right of the Prosecution in deciding whether or not to call a witness to testify in a case. It has been stated in that case by the Supreme Court that such right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof incumbent on it. So, the invocation or otherwise of adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution's case would very much be dependent upon the attending facts in each case and the acid test to apply is whether there has been failure to call a material witness thereby creating a material gap in its case, as was succinctly alluded to by Justice Mohd Azmi SCJ in *Munusamy v Public Prsoecutor* [1987] 1 MLJ 492. To my mind, where there is overwhelming evidence already adduced by the prosecution, then there is no longer an incumbent duty on it to call other witnesses, as such evidence, by its very nature, would have left no gap in the prosecution's case. In the then Supreme Court case of *Namasiyam v Public Prosecutor* [1987] 2 MLJ 336, it was stressed, before the appeal judges by learned counsel for Namasiyam, that one person by the name of Francis was a very material witness in the whole scheme of things concerned with the case and therefore, he ought to have been called as a witness by the prosecution and that the failure to call him as witness must be fatal to the prosecution's case. While the appeal judges agreed that Francis was indeed a material witness, yet his non-calling by the prosecution

ought not to be considered as fatal, because even without his testimony in court, the available evidence already led by the prosecution was so overwhelming that Francis's testimony would not count for much in so far as its utility towards proving the prosecution's case was concerned. In other words, each case must need be considered on its own merits and within its four corners and that an adverse inference would only be invoked against the prosecution if there exists a material gap in its case as a result of such failure to call a particular material(sic)(witness). It is worth noting as well that the *Namasiyam*'s case was not considered in the Supreme Court case of *Ti Huee Chiang*.

[39] By way of a reiteration, learned defence counsel emphasised that the prosecution did not call nor put SD2 on the stand and offer him to the defence for cross-examination. And if this was done, then the adverse inference under s 114(g) of the Evidence Act 1950 would not be activated and SD2 will no longer be the prosecution's witness as such because it has been offered to the defence for cross-examination.

[40] Learned defence counsel submitted further and we quote:

Sures is important. He will uncover the narrative of the case. Even if the narrative that the police is not happy with. But it is a narrative for the Court to discern in a capital punishment case like ours. The judge believed SP1 and refused to admit other possibilities.

[41] But, the second High Court judge was right when His Lordship noted that the appellant did not implicate SD2 in the appellant's cautioned statement. We agree with the learned deputy public prosecutor that SD2 —Sures, is not relevant to the unfolding of the prosecution's narrative because when the appellant was at the corridor/balcony throwing the bag ('P9') down, SD2 was inside the rented unit. And SD2 would not and could not see the appellant throwing the bag ('P9') to the ground level. It is the prosecution's case that it was the appellant who threw the bag ('P9') that contained the drugs to the ground level when SD2 was inside the rented unit watching television.

[42] It is trite law that adverse inference can only be drawn against the prosecution 'if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case' (per Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, 494 (SC)). But the prosecution has always the discretion to decide whether or not to call SD2 as its witness. And the prosecution has the right to decide not to call SD2 as its witness when the prosecution believes that that witness is not a witness of truth. The court cannot dictate to the prosecution as to which witness to call or otherwise. It is entirely within the

domain of the prosecution to decide. The court will be reluctant to interfere with the exercise of discretion by the prosecution not to call SD2 unless it can be shown, and this is not done, that the learned deputy public prosecutor having conduct of the trial before the second High Court judge 'has been influenced by some oblique motive' (per Lord Thankerton in the case of *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156, 168).

[43] The style of conducting the prosecution cannot be made the subject of criticism. If the prosecution fails to prove its case beyond reasonable doubt, the court will not hesitate to acquit and discharge the appellant. Whether the prosecution should have called SD2 and then offer him to the defence, is entirely the discretion of the prosecution and it should not be made the subject of criticism. Unlike the case of *Public Prosecutor v Nordin Awang* [2000] MLJU 631; [2001] 1 AMR 855, where the prosecution did not call or offer a person by the name of Mohd Yusuff who had custody of the van in which the drugs were found and the court invoked s 114(g) of the Evidence Act 1950, here SD2 was offered to the defence and at the time of the raid SD2 was seated at the living room watching television while the appellant was at the corridor/balcony of the unit carrying a bag ('P9') and throwing the bag ('P9') down to the ground level in clear sight of SP1.

[44] Be that as it may, the second High Court judge was of the opinion that SD2 was not an essential witness to the unfolding of the prosecution's narrative. It must be reiterated that the prosecution offered SD2 at the close of the prosecution's case and that offer was taken up by the defence. In our judgment, no adverse inference can be invoked against the prosecution as there has not been any suppression of material evidence. If the prosecution did not make an effort in ensuring that SD2 was available for the defence, perhaps it may be argued that the prosecution may have some oblique motive. Another salutary rule to consider is this. As a corollary to the discretion of the prosecution in conducting its case, it does not mean that the prosecution is duty bound to call all the witnesses whose statements have been recorded. Suffice that only witnesses considered material by the prosecution need be called bearing in mind that no particular number of witnesses shall be required to prove any fact (s 134 of the Evidence Act 1950; and *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251, pp 253–254).

[45] Next, in regard to the search list marked as exh 'P5', it was argued that the second High Court judge did not appreciate the error made by SP1 in regard to the time of the raid which was stated to be 1700 hours. But, it must borne in mind, that SP1 did correct himself during examination-in-chief when he said at p 12 of the appeal record at *jilid* 1:

> Jam '1700 HRS' yang disebut adalah satu kesilapan saya. Masa pemeriksaan yang sebenar lebih kurang 1900 HRS.

[46] In his written grounds of judgment, the second High Court judge did consider this mistake made by SP1 and His Lordship accepted SP1's explanation. This is reflected at p 274 of the appeal record at *jilid* 2, where His Lordship said and we agree with him that it is the correct appraisal of the law: A

> 7 I will deal with the issue on the search list first. What had happened in this case was that SP1 had made an oral correction with respect to stated time in the search list (P5) when the raid was carried out. In P5, the time of the raid was stated as being at '1700 hrs' whereas in his oral evidence he had stated it to be '1900 hrs'. SP1 had admitted in court that such situation had arisen as a result of his typing error when he was preparing the P5. According to learned counsel, this oral correction by SP1 ought not to be allowed as it would contravene the embargo on parole evidence under ss 91–92 of the Evidence Act 1950. To my mind, this P5 does not come within the class of documents that falls within the contemplation of such embargo and as such subsequent parole evidence may be allowed to amend or vary it. The learned Justice Abdoolcader J, in the case of *Public Prosecutor v Datuk Harun bin Hj Idris & Ors* [1977] 1 MLJ 180 at p 183 had said, 'And secondly, in the context of s 92 of the Evidence Act, the clause … would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other dispositions of property which the law requires to be reduced to writing, and not to every and all matters which the law requires to be reduced to writing into a document, …' The Federal Court would subsequently, on appeal, approve of the learned judge's conclusion on the matter. Based on that reasoning, clearly P5 is definitely not within the intended sight of the ss 91–92 embargo on parole evidence. As such, I was not persuaded by learned counsel argument on the issue.

B C D E

[47] Be that as it may, SP1's timing as to the search list is corroborated by his own police report marked as exh 'P4' where the timing of the raid is stated to be 1900 hours. And just because the second High Court judge did not observe the demeanour of SP1 while giving evidence in court, that does not mean that His Lordship is precluded from analysing SP1's evidence. As the succeeding judge, His Lordship is at liberty to consider the evidence of SP1 who has testified before the previous judge — referring to the first High Court judge. This is the correct and reasonable interpretation to adopt in construing s 18(2)(a)(i) and (ii) of the CJA and we must give effect to it accordingly. F G

[48] In regard to 'Jevan', whose name was mentioned by the appellant in the appellant's cautioned statement as a co-tenant of the rented unit, we have this to say about him. At the material time of the raid, Jevan was not in the rented unit. And Jevan, according to the learned deputy public prosecutor, was not relevant to both the prosecution and the defence. Moreover, the dangerous drugs were not found in the rented unit. It was found inside the bag ('P9') and the bag ('P9') was thrown down from the corridor/balcony outside the rented unit by the appellant. H I

[49] In his cautioned statement marked as exh 'D26', the appellant stated

A that he stayed in the rented unit with Jevan. But the appellant did not say in his cautioned statement that the drugs belonged to Jevan or to Sures (SD2). In his cautioned statement, the appellant described Sures (SD2) as a visitor who came at about 6.30pm to the rented unit in order to discuss about opening a 'teh-tarik' stall.

B

[50] In his statement marked as exh 'D29', Sures (SD2) did not mention the name of Jevan at all. And at the time of the police raid, Jevan was not in the rented unit. Thus, Jevan is an insignificant personality.

C

[51] There is a burial permit marked as 'IDD28' of Pubala Sandran a/l R Maniam whose nickname was said to be 'Jevan' according to Chandra Mohan a/l R Maniam (SD3). In his written grounds of judgment, the second High Court judge had this to say about the burial permit at para 22 of p 287 of the appeal record at *jilid* 2:

D

> 22 As such, I am inclined to agree with the learned Ms. Deputy that IDD 28 could be conveniently obtained as the OKT was in the business of casket making trade and such document as IDD 28 might very well be common place. Coupled with the fact that Jevan was supposed to be employed by the OKT and his partner as manager and
>
> E was supposed (to be) his house mate, it is rather incredible that the OKT only knew of Jevan's real name as per IDD 28 when he first saw it in 2007, having been handed to by his fiancee Davika. Indeed SD3 himself had said when he was cross-examined by the learned Ms. Deputy that, 'I agree that for official purposes like employment, he would use his full name Pubala Sandran a/I R. Maniam.' On top of that, I noted
>
> F too that the IDD 28 was a photostated copy and no attempt was made to produce the original. As Justice Abdoolcader J (as he then was) had ruled in *Datuk Harun Idris v PP* [1977] 1 LNS 92, such material which had not been properly admitted as an exhibit ought not to be taken into account, as it is not evidence as such.

G **[52]** And learned defence counsel was not pleased with this passage and he said that the second High Court judge was unkind in making those remarks. With respect, the second High Court judge was merely stating the truth. Even Sures (SD2) in his statement in 'D29' described the appellant as a coffin seller ('penjual keranda').

H

[53] In regard to the allegations that the appellant had been victimised, fixed up and unfairly framed by the police for trafficking in the dangerous drugs as per the charge, we have this to say. The issues pertaining to animosity or bad blood should have been introduced through SP1, SP6 and SP7 bearing in

I mind that they are police witnesses. Yet, this was not done. The second High Court judge in his written grounds of judgment stated that the appellant did not specifically suggest or put to SP1 or SP6 that they had fabricated evidence against the appellant. It must be borne in mind that both SP1 and SP6 stated that they did not know the appellant personally prior to the incident. In our

judgment, there is absolutely no plausible reason to frame up the appellant. Both SP1 and SP6 were honest about the role played by Sures (SD2). If indeed there was a frame up as alleged, and both SP1 and SP6 wanted to fix up the appellant at all costs, they would have taken the easy way out by fabricating evidence that the drugs were found in the appellant's rented unit in the presence of the appellant and Sures (SD2) and both of them would then be charged and that would effectively bolster the prosecution's case. But that was not the factual matrix of the case.

[54] According to the learned deputy public prosecutor, the evidence against the appellant is overwhelming. She lamented in the course of her submission before us that:

> What is so special about the appellant? I don't know.

[55] Be that as it may, in our judgment based on the evidence of SP1 and SP6 the appellant had physical possession of the bag ('P9') and had knowledge of the dangerous drugs contained inside the said bag ('P9'). This is fortified by the fact that the appellant tried to dispose off the bag ('P9') before SP1 introduced himself as 'Polis'.

[56] In our judgment, the evidence of SP4 must also be considered. SP4 testified that the appellant rented the premises from him beginning from the early part of 2003 and that a tenancy agreement ('P18') was entered jointly between SP4 and SP4's wife by the name of Lim Yok Lan (being the joint owners of the premises) with the appellant. One set of keys was handed to the appellant by SP4 and the rented unit was empty before the appellant moved into it. In cross-examination of SP4, no question was asked pertaining to Jevan being a co-tenant of the appellant in the rented unit at the material time.

[57] It is germane, at this juncture, to refer to the case of *Public Prosecutor v See Hee Meng* [1988] 2 CLJ (Rep) 318. In that case, the accused was seen carrying a bag running towards the back portion of the house. Two of the police officers chased after the accused and one of them saw the accused threw the bag over the wall which fell onto the zinc roof of premises No 45A below. The bag was retrieved and found to contain 155.11g of heroin. The accused alleged that there was no chase by the police and he denied throwing the bag over the wall. The High Court found that the accused was in possession of the said bag and the accused was found guilty of trafficking in heroin and was sentenced to death.

[58] In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 17; [2009] 1 CLJ 717 (FC), Augustine Paul FCJ discussed the issue of conduct and this was what His Lordship said at pp 746–747 of the report:

A (36) The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the
B flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his
C conduct pursuant to s 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v Stephenson* (1904) 68 JP 524).

D **[59]** The second High Court judge was perfectly entitled to make a finding of fact based on the evidence of the prosecution witnesses as well as the circumstances surrounding the case. At p 277 of the appeal record at *jilid* 2, His Lordship had this to say in his written grounds of judgment which we wholeheartedly agree:

E In fact, it came out from the cross-examination of SP1 by learned counsel that when the police came to the OKT's house, there was noise produced by the closing of the doors of the said police cars. Taken in the context of the whole evidence in this case, a reasonable inference could be drawn that such noise must have alerted the OKT of the presence of the police party thereby instigating his action to part company with
F the bag (P9) which he knew to contain the impugned drugs. In so doing, he was caught by SP1 in the act of throwing down the said bag (P9) from the corridor of his rented house at the stated material time as per the charge preferred against him.

G **[60]** That, in our judgment, is a reasonable inference to make following the testimony of SP1. We categorically say that no one would be able to know what the appellant had in mind at that point of time. In our judgment, the surrounding circumstances are the best barometer to determine the mental state of the appellant's mind at the time of the commission of the offence.

H **[61]** The impeccable judgment of the second High Court judge in the person of Justice Abang Iskandar bin Abang Hashim must be lauded. His Lordship meticulously analysed the facts and the law and we see nothing wrong with His Lordship's approach. It is a judgment par excellence. At pp 292–293
I of the appeal record at *jilid* 2, His Lordship succinctly said:

30 As such, it is my finding that the defence put up by this OKT had failed to create a reasonable doubt in the case for the prosecution with respect to possession of P9 and its contents. It is my finding that this OKT had indeed thrown the bag (P9) down from the balcony of his house as per the testimony of SP1 and as was seen and

collected by SP6. Although the OKT had denied that he had heard the said noise when put to him by the learned miss deputy, it is my finding that what SP1 had said when crossed-examined by the learned counsel was more than credible, in that indeed there was noise caused by the closing doors of the police cars' doors when the police raiding party members were alighting down from the said cars. By way of irresistible inference from such circumstances, it is my finding that this OKT had, beyond reasonable doubt, heard the noise of police cars' doors being closed, coming from outside the gate of his house and in haste, he had tried to part company with the said bag (P9) which he was seen to be holding with both his hands and which he was seen by SP1 to be in the act of throwing it down from the said corridor. The fact that he was seen to look scared when the SP1 shouted the word 'police' at him as testified by SP1 was indicative of the fact that he knew what was contained in the bag (P9) which he had thrown down from the said corridor. This factual assertion by SP1 that the OKT had looked scared was never challenged in the cross-examination of SP1. To my mind, under the circumstances of this case such reaction was consistent with a guilty mind. As there was direct evidence on the fact, through the testimony of SP1, that OKT was seen throwing the said bag (P9) down from the corridor, the negative finding on the presence of OKT's fingerprints on the incriminating drugs does not impact adversely on the prosecution's case. The learned Chief Justice Chong Siew Fai (Sabah and Sarawak) in the case of *Public Prosecutor v Mansor Md Rashid & Anor* had occasion to say the following: 'Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of great significance and value. In the instant case, however, the charge alleged trafficking in the form of a 'sale' and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence, therefore, assumed little value or significance'. Likewise in this case before me, the OKT was seen in the act of throwing down the bag (P9) that contained the impugned drugs with both his hands. Therefore there was direct evidence of an eye-witness (SP1) to that effect. The IO in this case did actually send the bag (P9) and its contents to be examined by police fingerprint analyst at the PDRM Forensic Laboratory in Cheras, but according to the said fingerprint analyst (SP8), he could not uplift any positive fingerprint from the articles that he had examined. It is therefore my finding that in the light of the evidence of SP1, the negative finding on the fingerprint has 'assumed little value or significance'. As such, the physical and the mental elements of possession of the bag (P9) and its incriminating contents, on the part of this OKT had been established via the evidence of SP1. This court was not able to accept the version of the OKT in that bag (P9) was brought into his room about 20 minutes after the police had entered his house and had arrested him, on account of the reasons set out by me above. Neither had his version succeeded in creating a doubt on the prosecution's case on the element of possession.

[62] Continuing at p 293 spilling over to p 294 of the appeal record at *jilid* 2, His Lordship spoke of the presumption of trafficking invoked against the appellant in this way:

31 But that finding by this court of the failure of the OKT to create a reasonable doubt as to his possession over the drugs alone is not enough to automatically convict this OKT for the offence of trafficking. The factum of trafficking, if the

A evidence so warrant, will have to be arrived at as a separate exercise as could be seen in the speech by Justice Mohd Azmi SCJ, in the case of *Mohd Radzi bin Yaakob v Public Prosecutor* [2008] 1 LNS 27. Here, the presumption of trafficking had applied against this OKT by virtue (of) the fact that he had been found to be in actual possession by way of evidence (as opposed to 'deemed' possession) of more than 15g of Heroin and Monoacetylmorphines. In this case, the nett weight amount of the Heroin and Monoacetylmorphines was 107.7g. In this case the drugs were contained in five plastic packets which in turn were wrapped up in brown paper which to my mind was indicative of the fact that they were ready for sale or delivery to another person. The defence put up by this OKT also did not present to this court that the said drugs had been meant for his own consumption. An inference of trafficking under such circumstances would be hard to resist. It has not been a case whereby the accused was trying to justify possession of the drugs as indeed the defence by this OKT had been one of complete denial of having anything to do with the said drugs. That has indeed been a brave defence. However, such defence had not rebutted the presumption of trafficking that had operated against the OKT on the balance of probabilities.

[63] The fact that the appellant was seen carrying and throwing the bag ('P9') down from the corridor/balcony in front of his rented unit and the fact that the appellant turned his head towards SP1 and looked scared, all lent support to the irresistible inference that the appellant knew what he had in his possession when he was arrested by SP1. The amount of the dangerous drugs was also indicative of trafficking.

[64] Taking the defence of the appellant and considering it in the context of the whole case, we found it to be incapable of belief and we found as a fact too that it was not one that was probable under the cricumstances. It is our judgment that the defence had fallen far short of rebutting the presumption of trafficking on the balance of probabilities and as such, it had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt.

[65] There are no appealable errors and it is safe to convict the appellant. Accordingly, we affirm the decision of the High Court. The conviction and sentence of the appellant are hereby affirmed. And the appeal by the appellant against conviction and sentence are hereby dismissed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar